

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL E. LOPEZ)	
Claimant)	
)	
VS.)	
)	
IMBC CORPORATION)	
Respondent)	Docket No. 1,035,424
)	
AND)	
)	
TRAVELERS INDEMNITY CO. OF AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 11, 2008 preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) entered an order directing respondent to bear the cost to replace a lost prosthesis for claimant's little finger. The ALJ explained that although the claimant lost her prosthesis while working for a subsequent employer, the respondent should be made to pay for the cost of a new one as respondent would eventually need to replace it anyway once it wore out.¹

The respondent requests review of this decision alleging that the ALJ exceeded his jurisdiction in awarding claimant the cost of a new prosthesis when the evidence established that a new accident occurred at a time claimant was employed by another employer. Accordingly, respondent requests the Board reverse the ALJ's Order.

¹ ALJ Order (Feb. 11, 2008) at 1.

Claimant contends that respondent failed to establish a new accident that would terminate responsibility for claimant's replacement prosthesis under K.A.R. 51-9-2. And as a result, the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds that the ALJ's Order should be affirmed, albeit for a different legal reasoning.

Claimant lost a portion of her little finger on her right hand on October 5, 2006 while working for respondent. Thereafter, she was provided with a prosthetic finger. In an effort to extend the life of her original prosthesis and obtain a better color, she was given a second prosthesis.

Claimant has since left respondent's employ and now works for Wal-mart working with cold materials. While working for Wal-mart, claimant lost her prosthetic finger. Claimant does not know exactly when or how she lost the finger, only that she was working for Wal-mart at the time and that the loss occurred sometime between 5 and 6 a.m. and the finger has not been located.

Claimant asked respondent to replace the prosthesis but was denied. A preliminary hearing followed and the ALJ issued an order that contained the following:

After reading the parties's's [sic] comments about the liability for replacement of Ms. Lopez's little finger prosthesis recently lost at work at Walmart [sic], both employers seem to be liable to her for it. It's [sic] loss was another compensable accident according to K.A.R. 51-9-2. But it was not a new injury as the liability for its continued availability preserved her right to its replacement against IMBC. Since she has a continuing claim against the latter that is the most accessible to her, since, she has not filed a claim yet against Walmart [sic] and won't need to if she can obtain it from the previous employer. The prosthesis would eventually wear out anyway.

Academically, IMBC would be subrogated to her rights to recover the loss from Walmart [sic], which can possibly be enforced in a regular court action. Otherwise she would need to file an injury claim to be processed routinely as a new injury against Walmart [sic].

So it is determined that judicial economy dictate a decision that IMBC should provide the replacement, just needing to a little sooner than expected.²

² *Id.* at 1-2.

After considering the parties' arguments, the record as a whole and the regulation both parties have referenced, this Board Member concludes that the claimant's loss of her prosthesis, albeit while working for Wal-mart, but in an unexplained event is more akin to wear and tear of the prosthesis rather than a new and independent accident. Claimant is only able to isolate the time of her loss, but is otherwise unable to explain how the prosthesis came to be missing. She has opined that due to the temperatures of the working environment, her skin shrank allowing the suction to be lost, causing the member to fall off. That explanation is reasonable and is, in this member's view, more like normal wear and tear that would be expected rather than a wholly independent and unanticipated accident. Under the rationale expressed in *Solis*³, respondent IMBC is responsible for replacing claimant's lost prosthesis. The ALJ's dicta regarding Wal-mart's potential liability for some unfiled claim is irrelevant to the pending issues.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated February 11, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Kevin J. Kruse, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

³ *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 999 P.2d 921 (2000).

⁴ K.S.A. 44-534a.